EXHIBIT A

ORACLE

17 DEC 1975
OGC Has Reviewed

MEMORANDUM FOR: Chief, Procurement Management Staff, OL

STATINTL SUBJECT : Legal Analysis of [redacted] Project ORACLE

REFERENCE : PMS Memo of 25 Nov 75

1. In accordance with a request from the Chief, Procurement Management Staff, OL, an analysis of the Government's position regarding the above-captioned contracts was performed. The facts of Project ORACLE have been detailed in separate memoranda by the Contracting Officer and Contracting Officer's Technical Representative. Except where clarification requires, the facts will not be repeated in any detail.

STATINTL 2. Contract No. [redacted] for the furnishing of certain equipment on a fixed price basis (hereinafter referred to as the hardware contract) was entered into on 11 June 1973. Basically, it provides for the following:

a. Increment I Equipment -- Certain enumerated equipment detailed on page 2 of the basic contract.

b. Increment II Equipment -- Certain optional equipment which can be purchased subsequently.

c. Accommodation Procurement of certain hardware authorized by the original contract clause entitled "Authorization for the Purchase of Equipment" as subsequently modified by Amendment No. 3.

d. Equipment Rental as provided for in Amendment No. 5 to the hardware contract.

3. For the purpose of this discussion, the problem concerning the hardware is generally concerned with Increment I items.

STATINTL 4. Contract [redacted] is a cost plus fixed fee agreement to provide certain software which, when coupled with the hardware from Contract [redacted] forms the Mass Storage System.

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5. The history of both contracts has been one of frustration for the Government characterized by the reaching of the estimated cost without accomplishment of the contract objective. In general terms, the contractor has made very little progress.

STATINTL 6. In an effort to put Project ORACLE back on track, Amendment No. 5 to [redacted] (software) was executed by the parties on 30 May 1975, nearly 2 years after the signing of both contracts. Amendment No. 5, a supplemental agreement, is a crucial modification which has impact on the entire project. Amendment No. 5 recognized that the allocated funds had been expended and the scope of work revised. Essentially, it provided the following:

a. The Final Design Review has been completed.

b. The Mass Storage System Design (Specification) dated 19 March 1975 has been incorporated into the contract and forms the basis for design, development installation, and final acceptance of the system.

c. New program milestones replaced those of the original contract. (This will be examined in detail below.)

d. A new Deliverable Items clause was added to replace the original one. Noteworthy are the provisions of the subparagraphs which include:

(1) All hardware items from [redacted] as they are completed and accepted by the Government their accountability is transferred to this contract (CPFF) to be incorporated into the end item identified as the MSS. Transfer of accountability and evidence of acceptance shall be accomplished by use of Standard Form DD 250. All shall subject to Article 19, Section E General Provisions. (Article 19 is the Government property clause.) STATINTL

(2) Final software in accordance with MSS design (specification) 19 March 1975 will be delivered February 1976.

e. Attachment II to Amendment No. 5 superceded that section of Exhibit II to original contract entitled Test 3--Final Acceptance Test.

f. Period of Performance for completion of all work under this contract was extended from 30 August 1975 until 30 August 1976.

g. The estimated cost for performance of all work under this contract, exclusive of fixed fee, was increased by $855,896 from

STATINTL [redacted] as stated in Amendment No. 4 to a new total of [redacted] STATINTL Noteworthy was the fact that the fixed fee was reduced albeit by $1 from $126,917 to $126,916. Thus, the total CPFF for completion of all work was increased by $855,895 from [redacted] STATINTL It should be noted also that Amendment No. 6 to the hardware contract extended completion date of that contract to reflect the extension provided in the software contract.

STATINTL 7. The first important milestone to be missed by the Contractor subsequent to Amendment No. 5 was the [redacted] preshipment test which is the first half of the Preshipment Acceptance Test, also known as Test II or PSAT. The second half of the PSAT, a more difficult requirement closely akin to final acceptance testing, is to be performed at Contractor's [redacted] lo- STATINTL
STATINTL cation subsequent to passing the [redacted] PSAT phase.

8. According to the COTR, [redacted] PSAT STATINTL originally scheduled for September 1975 but slipped to November 1975 at
STATINTL Contractor's request revealed "serious hardware problems and many software deficiencies" (COTR memo [redacted] PSAT, 4 December 1975) which were characterized largely but not exclusively by the mobility of the system to transfer files between the mass storage media (tape) and disks and back. A more comprehensive explanation of the technical deficiencies has been prepared by the COTR.

9. Apart from the failure of the [redacted] PSAT, the COTR has in- STATINTL dicated that in four areas the Contractor is not complying with the specifications into Contract [redacted] by Amendment No. 5. These areas include the following:

STATINTL a. Storage control processors accessing transport drivers--hardware design.

b. Usage of two storage control processors in the mass storage system--software design.

c. Access of data private to the mass storage system--software design.

d. Data channels, transport drivers, external data channel processors and their interconnections--hardware design.

10. In addressing questions 3a and b of the memorandum from the Chief, PMS/OL, dated 25 November 1975, absent information to the contrary which may be received from the Contractor as a result of the imminent meeting, [redacted] inability or unwillingness to perform satisfactorily amounts to failure to make progress which is distinguished from failure to deliver on time. As to that possibility, it is to be noted that the final delivery date was extended by Amendment No. 5 (software) and Amendment No. 6 (hardware) until 30 August 1976. Although Contractor has missed milestones, the Court of Claims has definitively stated that milestones are not delivery dates (Bailey Specialized Buildings, Inc., v. United States, 186 Ct. Cl. 71, 404 F. 2d 355 1968). As a condition to default termination for failure to make progress, the Government must provide the Contractor with a cure notice in writing which allows the company to a reasonable time for the particular contractor to respond. The cure notice must specify the progress failures in sufficient detail to enable the Contractor to effect a cure. (See ASPR 8-602 et seq.) Failure by the Government to detail the Contractor's defects will probably be fatal to an attempted default termination (Churchill Chemical Corp. GSBCA No. 3790,74-1 BCA¶10,639; H. Lynn Williams, AGBCA No. 301, 72-2 BCA¶9708.) Underlying the entire default termination procedure is the expressed position of the ASBCA of its reluctance to see a termination for default. STATINTL

11. While the delivery date per se has not yet come to pass, the recent Court of Claims decision involving the Agency [redacted] has resulted in a new doctrine, that of Pre-Delivery Date Waiver. The basis of this new concept is that, if it is apparent that the Contractor will not be able to timely fulfill his delivery obligations and the Government manifests lack of concern for compliance with the schedule and an intention to accept late performance, the contract may not be terminated for failure to deliver. ([redacted] v. United States, Ct. Cl. [redacted] [decided January 22, 1975]). The rationale goes on to say that, when it is clear that a Contractor will be unable to perform per the schedule, he is already in default for failure to make progress. In such circumstances, the Government would be justified in terminating for default. The fact that the Government indicates a contrary intention by expressing a willingness to accept late performance may constitute a predelivery date waiver. It is emphasized that such doctrine is new, and the courts and boards have not spoken further on it. STATINTL STATINTL STATINTL

12. Before leaving the matter, assuming arguendo the situation just described is applicable to the instant contracts, the next step must be considered. Upon a failure to perform on or before a contract due date, the Government must within a reasonable time elect whether to terminate for default or to permit continuance of performance. The Government is entitled to take sufficient time to determine what actions will be in its best interests. Any time during this period of forebearance, the Government may elect to terminate for default without waiving the original delivery schedule. It has been often held that the mere fact that the

Government has a right to terminate for default does not require it to do so.[1]

13. Questions 3d and 3e will be addressed together. As noted acceptance of the Mass Storage System occurs under the CPFF contract. Amendment No. 5 to [redacted] provides at paragraph 5 that:

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> Attachment II to this amendment supercedes and replaces that Section of Exhibit II to the original Contract entitled, "Test 3 - Final Acceptance Testing."

Attachment II to Amendment No. 5 states at paragraph 2:

> Objective of Tests - The objective of the Final Acceptance Tests is to test the software and hardware provided under the contract as a system in the Sponsor's environment to ensure that the system satisfies the requirements set forth in the Mass Storage System Design (Specification document dated 19 March 1975.

Moreover, at paragraph 6, it is stated:

> The Final Acceptance of the MSS system by the Sponsor will be contingent upon two conditions being met:
>
> a. successful completion of Final Acceptance Tests as described above (in Attachment II), and
>
> b. Government approval of Final Documentation.

[1]Sol O. Schlesinger, d/b/a Ideal Uniform Cap Co. v. United States. 182 Ct. Cl. 571, 390F.2d 702 (1968); DeVito v. United States, 188 Ct. Cl. 979, 413 F.2d 1147 (1969).

STATINTL 14. Before opining whether the Government can terminate for default Contract No. [redacted] or the hardware contract, examination of what constitutes final acceptance of hardware under the firm-fixed price contract is in order.

STATINTL The hardward contract, [redacted] at page 2, Scope of Work, essentially states that:

> Upon final installation and acceptance of the initial system at the Government's facility, the Government reserves the option to procure additional Dual Transport Modules....

This language indicates that final acceptance occurs at the Government's site. Further, Amendment No. 1 to the fixed price contract Scope of Work has expressed:

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> The initial system listed above shall be tested in accordance with Test 2 - System Pre-Shipment Acceptance Test defined and identified in Exhibit II under [redacted] (CPFF Software). Upon the successful completion of such acceptance test (PSAT) estimated to be the end of the 16 months, the Government shall pay... (explanation supplied).

Moreover, a paragraph added to the Scope of Work to clarify the option period, "final acceptance" again appeared:

> It is further understood and agreed that the 90 day option is based upon the Contractor delivery, installing, and successfully completing final acceptance on or before 12 April 1975. In the event Contractor should fail to pass the final acceptance or other slippages caused by the Contractor, option shall commence...on date of acceptance. (emphasis supplied). Compare the above with Amendment No. 5 (CPFF) paragraph 4, Deliverable Items where it is stated:

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> a. All the hardware items being procured under Contract [redacted] (CPFF, Hardware) as they are completed ... and accepted by the Government, their accountability is transferred to this Contract (CPFF, Software) to be incorporated

> into the end item identified as the Mass Storage System. Transfer of accountability and evidence of acceptance shall be accomplished by use of the Standard Form DD 250 (Acceptance form). All shall be subject to Article 19 of Section E, General Provisions. (Emphasis and explanation provided).

This provision is noteworthy since the execution of DD Form 250 manifests the fact that the Government accepts the hardware. Moreover, Article 19 of the General Provisions is the Government Property clause, hence the meaning that comes across is that the hardware becomes GFP and then is provided to Contractor for further use in the software contract. In the instant case, no acceptance has occurred because of failure at the PSAT stage, hence the ambiguity construed against the drafter has not presented itself.

15. In regards to question 3e, the lack of a specific performance remedy has been discussed previously and will not be repeated here. Basically, the Government can terminate for default. Several possible results could occur as a result. Regrettably, no course of action stands out over the others.

16. To begin with, it is possible that the Armed Services Board of Contract Appeals would disagree with the default terminations and convert them to convenience terminations with settlement being in accordance with the provisions found in the contract based upon ASPR 7-402.10. Termination of the CPFF contract basically permits all allowable costs plus fee, plus settlement costs. The convenience termination for the hardware contract would eventually result in allowance of all costs incurred plus a profit on the work completed. Cost of settlement proposal for the CPFF is allowable.

17. Secondly, the Board may find that the termination was valid but, again, restrict recovery to the contract provisions. (See in particular ASPR 8-407 terminations.) As pertains to the CPFF contract, this means the Government would have to pay allowable cost but adjust the fee downward. Costs of preparing settlement proposal are not allowed. The termination clause of the CPFF contract does not permit reprocurement. Under the FFP contract, the default clause provides a detailed remedy including the fact that progress payments are recoverable as well as the right to reprocure.

18. Thirdly, it has been argued that Amendment No. 5 to the CPFF contract converted the CPFF to a fixed price contract based upon the placing of a ceiling price on the contract coupled with a promise to complete the work made by the contractor. There is one Board decision that supports the possibility that such a conversion has occurred. In a case involving the Agency during 1965, which concerned the limitation of cost clause and the contractual authority of a company official (estoppel), the contracting officer asserted that the granting of additional funds would be contingent upon an agreement to complete the contract without further requests for funds. The contractor's vice president for R&D agreed and admitted he realized that such created a fixed price contract. The Board upheld the contracting officer's refusal to pay another claim of additional costs subsequently made by contractor. It was determined that the supplemental agreement which granted additional funds under a cost-plus-a-fixed fee contract limited the maximum amount payable under the contract.

19. The case, while favorable to the Agency position, has not been cited subsequently for the contract conversion aspect but rather only for the estoppel principle, and it really does not stand for that proposition that an agreed-upon ceiling price converts a cost type into an FFP.

20. It is possible to argue also that the relationship between the parties changed so drastically by the inclusion of the Amendment No. 5 that a fixed price contract results and, in accordance with the G.L. Christian doctrine, the fixed price default clause should be read in as a matter of law notwithstanding its absence from the contract. (G.L. Christian and Assoc. v. United States, 312 F.2d 408 (Ct. Cl. 1963). This is doubtful in view of the obvious trend to restrict the inclusion of clauses by operation of law theory which exists today. In all probability, the Board would not find a G.L. Christian situation and, hence, the language of the contract as it exists relative to terminations would prevail, leaving us only with cost type termination clauses.

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Office of General Counsel